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No. 03-710

IN THE

Supreme Court of the United States

GERALD DEVENPECK, ET AL.,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Respondent Jerome Anthony Alford was pulled over when motorists reported that Alford's vehicle was outfitted with "wig-wag" headlights creating the impression of a police car. The officers, Petitioners Gerald Devenpeck and Joi Haner, noticed a portable police scanner, a radio broadcasting the communications of the sheriff's office, and a set of handcuffs in his vehicle. When the officers asked Alford to demonstrate the wig-wag headlights, he claimed he was unable to do so, even though they were easily activated with the press of a button near the steering wheel. The officers also discovered that Alford had been surreptitiously tape recording their conversation with a hidden recorder.

The officers arrested Alford for the tape recording, but exercised their discretion not to charge him at that time with impersonating an officer or with obstructing their investigation. When the tape recording charge was later dismissed, Alford sued the officers, alleging that he was arrested without probable cause. The Ninth Circuit held that even if probable cause existed to arrest Alford for impersonation and obstruction, the arrest nonetheless violated the Fourth Amendment because those offenses were not "closely related" to the tape recording offense. The Ninth Circuit also reversed the jury's verdict granting the officers qualified immunity.

Amicus will address the following questions:

1. Whether an officer who has probable cause to arrest for two offenses commits an unconstitutional seizure if his subjective motivation in making the arrest is a mistaken belief that he has probable cause to arrest for a third offense.

2. Whether, for purposes of qualified immunity, the law can be deemed "clearly established" on the basis of a single decision from an intermediate state appellate court from outside the area where the challenged conduct occurred.

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BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for the Community Interest ("CCI") is a national, not-for-profit organization dedicated to public safety and urban quality of life. CCI works with public officials and community groups across the country to develop and defend policies that strike a common-sense balance between the rights of the individual and the needs of the larger community. CCI has participated in a wide range of public safety and quality of life cases before this Court and other courts throughout the country, and has developed model legislation, policies, and internet resources that help communities address problems such as illegal gangs, disorder in public spaces, nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods.

CCI has participated as *amicus* before this Court in several recent cases involving the Fourth Amendment and questions of criminal procedure, including *United States v. Knights*, 534 U.S. 112 (2001), *Dickerson v. United States*, 530 U.S. 428 (2000), *Chicago v. Morales*, 527 U.S. 41 (1999), and *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998). CCI is concerned that the Ninth Circuit's decision in this case, if allowed to stand, would endanger public safety and needlessly hamper law enforcement by exposing police officers to personal civil liability for making lawful arrests supported by probable cause.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, CCI states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than CCI or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. Factual Background

This case arises from a traffic stop and arrest that occurred by the side of a darkened highway in Washington state on a rainy evening in November, 1997. State Trooper Joi Haner was on duty when he noticed Alford's car pulling in behind a disabled vehicle parked on the shoulder. Trial Transcript ("Tr.") 202. Haner made a U-turn and drove back to see if the stranded motorists needed his assistance. *Id.* He pulled in behind the vehicles and as he was walking toward them, he encountered respondent Alford, who told him that the stranded motorists had a flat tire and needed a flashlight. *Id.* Haner noticed that Alford appeared to be in a hurry; Alford did not stop or pause to speak with Haner, but simply walked past the officer and got into his car. *Id.* at 202-03.

Haner approached the stranded car and discovered it contained two men. *Id.* at 203. The two men asked the trooper whether respondent Alford was a police officer. *Id.* at 204. When Haner asked what gave them that impression, they told him that Alford's vehicle had wig-wag headlights—*i.e.*, headlights that flash alternately—and that they had concluded that Alford was an officer. *Id.* At that moment, Alford's car was pulling out past them onto the highway. Haner pointed out the car and asked the motorists to confirm tha. that was the vehicle in question. The motorists said, "[y]eah, we thought he was a cop." *Id.*

After making sure the motorists had everything they needed to change their tire, Haner got back into his vehicle and drove off after Alford. Haner explained that his purpose was to "investigate [why] he had wig-wag headlights and why he was leaving the impression with these people that he was a police officer." *Id.* at 204-05 ("I was kind of having some concerns as far as what [Alford's] intentions were and some fears for public safety . . . if he's pulling in behind cars and leaving an impression that he's a police officer."). As he drove, Haner contacted his supervisor, Sergeant Gerald Devenpeck, and asked for assistance. Haner testified that "I

thought I might have an impersonator or a 'wanna be' cop, so to speak, and I wanted the supervisor there because I did not know what I was going to be getting into." *Id.* at 206.

Trooper Haner caught up with Alford and pulled him over to the side of the road. He was unable to run a check on Alford's license plate because it was obscured by a dark, tinted cover. *Id.* at 209. Haner approached the vehicle from the passenger side and spoke with Alford through the open window. *Id.* at 210.

Haner immediately noticed that Alford had a police-band radio in his vehicle broadcasting the communications of the Kitsap County sheriff's office. *Id.* Attached to the radio was a microphone. *Id.* at 211. Haner also noticed a pair of handcuffs in the back seat. *Id.* at 212.

Alford began by telling Haner that he used to be a police officer in Texas—a statement Alford later admitted was a lie. *Id.* at 137-38 (Alford testimony that his claim to have been a Texas officer "was not the truth" and that he lied in hopes that Haner "would just cut me a little bit of slack, professional courtesy"), 213. Haner asked about the wig-wag headlights, and Alford asserted that they were part of a recently-installed alarm system on his vehicle. *Id.* at 214.

Haner then asked Alford to demonstrate the wig-wag headlights. Alford kept pushing different buttons on his key chain, but was seemingly unable to activate them. *Id.* at 214-15. Haner suspected that Alford was not making an honest effort to turn them on. *Id.* at 214 (Haner testimony) ("As [Alford] was going through it more and more, I was believing that he was being a little more evasive and he wasn't trying to turn them on. He was trying to avoid it."). Alford was never able to activate the headlights. Later, the police activated the headlights by pushing a button built into the car's dashboard and confirmed that they "looked identical" to the wig-wag headlights on a patrol car. *Id.* at 230, 310.

Sergeant Devenpeck arrived on the scene and the two officers conferred by Haner's vehicle. Haner advised his supervisor that he "suspected [Alford] had wig-wag headlights

but was being evasive and not turning them on." *Id.* at 217. Haner further explained that Alford "had the police frequencies, the handcuffs, and other things; that he left the impression that he was a police officer with the people who were disabled." *Id.*

Devenpeck approached Alford's vehicle and began questioning him through the open passenger-side window. Alford told Devenpeck that his use of the wig-wag headlights had been authorized by the Kitsap Country sheriff's office. *Id.* at 312-13. At one point in the conversation, Alford moved his arm and dislodged a jacket on the passenger seat, revealing a tape recorder that was recording the conversation. *Id.* at 301.

Devenpeck told Alford that he was under arrest for unlawful tape recording in violation of Washington's Privacy Act, and Haner removed Alford from the vehicle. *Id.* at 301. Alford asserted that his tape recording was lawful. *Id.* at 307.

Devenpeck reviewed the text of the Privacy Act to confirm that his view of the law was correct and that Alford's was wrong. *Id.* at 312. Devenpeck also made a series of calls from the field. First, he called the Kitsap County sheriff's office in an effort to validate Alford's claim that the sheriff had authorized his use of the headlights. Devenpeck spoke with a sergeant in the office who said he knew nothing about it. *Id.* at 312-13.

Devenpeck then called a trooper to obtain the home phone number of Mark Lindquist, the deputy Washington State prosecutor who would be handling the case. Devenpeck obtained the number and left a message on Lindquist's answering machine. *Id.* at 314. Devenpeck called back a few minutes later and this time the prosecutor answered. Devenpeck summarized what had happened and read the text of the Privacy Act over the phone. *Id.* at 315. Lindquist advised Devenpeck that the arrest was a "good arrest" and supported by probable cause. *Id.* at 316.

Lindquist also advised Devenpeck that there existed probable cause for obstructing an officer's investigation "based on the runaround the guy gave you," as well as for

impersonating a police officer. *Id.* at 319 (Devenpeck); *id.* at 363 (Lindquist) ("we also discussed possible impersonation of an officer charge here and possible false representation to an officer"). Devenpeck cautioned Lindquist, however, that "the State Patrol doesn't stack charges." *Id.* at 320.

At the jail, Alford was booked on the Privacy Act charge and issued a notice of infraction for the wig-wag headlights. *Id.* at 239-41; Joint Appendix 24-25.

2. Proceedings in the Lower Courts

The Privacy Act charge was later dismissed, and Alford sued Devenpeck and Haner under 42 U.S.C. § 1983, alleging that the arrest violated his Fourth Amendment right to be free from unreasonable seizure. A jury found for the officers and the district court denied Alford's motion for a new trial.

The Ninth Circuit reversed. The court held that the officers lacked probable cause to arrest Alford for violating the Privacy Act, and that the presence of probable cause to arrest for impersonation or obstruction could not cure the Fourth Amendment violation. *See* 333 F.3d 972, 976-77. In reaching this conclusion, the court relied on the "closely-related offense" rule, which provides that if there was not probable cause to arrest for the crime articulated by the officer at the time of the arrest, the arrest is constitutional *only* if probable cause existed for a "closely related" offense that "involves the same conduct for which the suspect was arrested." *Id.* at 976 (quotation and emphases omitted). The court reasoned that because "[a]ny impersonation charge would be based on Alford's use of wig-wag headlights," and because "[a]n obstruction charge would be based on Alford's evasion in allegedly not turning on the wig-wag lights assuming he knew how," these offenses did not qualify as "closely related" and could not justify the arrest. *Id.*

The court also held that the officers were not entitled to qualified immunity. The court found that Washington caselaw permitting the tape recording of a traffic stop was clearly established, and that the officers' conduct was not objectively

reasonable. *Id.* at 977-79. The court concluded that "[b]ecause in light of the facts and clearly established law no objectively reasonable officer could have concluded that arresting Alford for taping the traffic stop was permissible, defendants were not entitled to immunity." *Id.* at 979.

Judge Gould dissented, pointing out that "the determination of reasonableness is in the province of the jury" and that the officers "quite obviously were doing their job to protect the public." *Id.* He noted that the officers "stopped Alford for good reason because his approach to stranded vehicles, giving an appearance that he was a police officer, was ominous to say the least." *Id.* Moreover, the "officers arrested Alford in good faith, with their judgment seconded by a public prosecutor who was consulted." *Id.* at 980. In short, "[t]he officers did not arrest Alford on a rogue mission, nor motivated by malice, nor on a whim; instead, they provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating; the officers called the prosecuting attorney, told him the facts, and read the statute to him." *Id.*

Judge Gould stated that "[t]he reason that the arrest turned out to be illegal here was that the broad literal text of the privacy statute had been interpreted restrictively by an intermediate state appellate court in an opinion that was not known by the officers or familiar to the prosecuting attorney." *Id.* at 981. Accordingly, he concluded, where the officers' "mistake was that they interpreted a state statute literally despite a state court ruling that had narrowed it," the jury's determination that the officers' conduct was reasonable should not be disturbed. *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the decision below and declare the closely-related offense rule a dead letter in the wake of *Whren v. United States*, 517 U.S. 806, 812 (1996), which recognized that "an officer's motive [cannot] invalidate[ ] objectively justifiable behavior under the Fourth Amend-

ment." The closely-related offense rule improperly focuses on the officer's motivation in making the arrest by asking whether the offense that prompted the arrest is closely related to an offense for which probable cause existed. The rule results in erroneous findings that the Fourth Amendment was violated in cases like this one, where the officers engaged in "objectively justifiable behavior" and the challenged arrest *was* supported by probable cause. This Court should hold that an arrest is constitutional if the facts and circumstances known to the officers at the time of the arrest would give rise to probable cause to arrest for *any* offense.

In the event it reaches the question, this Court should reverse the Ninth Circuit's determination that the arresting officers in this case were not entitled to qualified immunity. The sole basis for finding Alford had a "clearly established" right to tape record the officers was a single decision by an intermediate appellate court from a different area of Washington State that is distinguishable on its facts. In any event, the officers' conduct was objectively reasonable, as reflected in their good-faith efforts to parse the text of a broadly worded statute and in telephoning the deputy prosecutor, who confirmed that their legal judgment was correct.

ARGUMENT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This case presents the question whether the Fourth Amendment is violated when probable cause exists to make an arrest for one offense, but the officer mistakenly elects to arrest the defendant for a different offense that was *not* supported by probable cause. The Ninth Circuit held that such a seizure is constitutional only if the two offenses are "closely related" and "involve[ ] the same conduct." 333 F.3d at 976 (emphasis and quotation omitted).

I. THE CLOSELY-RELATED OFFENSE RULE IS INCONSISTENT WITH *WHREN* AND THIS COURT'S FOURTH AMENDMENT DECISIONS

The fundamental flaw in the Ninth Circuit's reasoning is that it depends on the officer's motivation in making the arrest. This methodology is inconsistent with this Court's Fourth Amendment jurisprudence, which requires an exclusive focus on the objective facts and circumstances known to the arresting officer in determining whether a seizure is "reasonable."

A. The Fourth Amendment Inquiry Considers The Objective Circumstances Of The Arrest, Not The Officer's Subjective Motivation

1. In *Whren*, this Court held that a traffic stop supported by probable cause is consistent with the Fourth Amendment, *regardless* of the police officer's motivation in making the stop. The case arose when the defendants were driving a truck in a high-drug area and were pulled over by the police. The ostensible reason for the stop was that the defendants had pulled away from a stop sign at an unreasonable speed and had not signaled when turning. The officers discovered drugs in the truck, and the defendants attempted to suppress the evidence by challenging the stop as pretextual. *See* 517 U.S. at 808-09.

In a unanimous decision, this Court rejected the suggestion "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved," and held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. The Court noted that outside the context of inventory searches or administrative inspections, it had never held that "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment," and in fact had "repeatedly held and asserted the contrary." *Id.* at 812. The Court concluded that "the Fourth Amendment's concern with

'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814.

In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), this Court held that *Whren* applies to custodial arrests as well as traffic stops. The Court squarely rejected the lower courts' conclusion that the challenged arrest, "although supported by probable cause, nonetheless violated the Fourth Amendment because [the officer] had an improper subjective motivation for making the stop." *Id.* at 771. The Court again emphasized its "unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers," and reiterated that the officers' "subjective intentions" cannot invalidate an arrest when the objective circumstances known to the officer establish probable cause. *Id.* at 771-72 (quotation omitted).

2. *Whren* and *Sullivan* follow a long line of this Court's precedent establishing that the Fourth Amendment/probable cause analysis hinges on the objective facts and circumstances known to the officer at the time, and not on the officer's subjective reasoning for making the seizure.

In *Beck v. Ohio*, 379 U.S. 89, 91 (1964), for example, the Court explained that "[w]hether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Similarly, in *Terry v. Ohio*, the Court emphasized that "in making [the Fourth Amendment] assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?" 392 U.S. 1, 21-22 (1968) (quotation omitted).

In short, the Fourth Amendment analysis focuses on what a reasonable officer *could have* believed based on the

facts available at the time; it does not depend on what the individual officer in the case *actually* believed. This principle is illustrated by *Scott v. United States*, 436 U.S. 128, 138 (1978), where the Court explained that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." The Court noted that "[a]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137.

Florida v. Royer, 460 U.S. 491 (1983), strongly supports the conclusion that the individual officers' belief as to whether probable cause existed is irrelevant to the Fourth Amendment inquiry. *Royer* presented the question whether the defendant was being illegally held at the time he gave consent to open his luggage. The State argued that the defendant was not being held illegally when he consented, because there was probable cause to arrest him at the time. *Id.* at 507. Although the arresting officer had testified at the suppression hearing that there was no probable cause to arrest until the luggage was opened, and the Court ultimately concluded that probable cause was lacking and reversed the conviction, the controlling four-Justice plurality emphasized that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying [the defendant's] custody by proving probable cause and hence removing any barrier to relying on [the defendant's] consent to search." *Id.* Three of the Justices who dissented from the reversal of the conviction apparently agreed with this analysis. *See id.* at 530 n.8 (noting that the detention "would also pass muster" under probable cause standards, but arguing that the conviction could be affirmed on other grounds, so

that "the probable-cause issue need not be decided in this case").[2]

Indeed, the rule could hardly be otherwise, for a number of this Court's cases establish that an arrest is lawful if probable cause exists even when the arresting officer himself is aware of *none* of the facts that establish probable cause. Beginning with *Whiteley v. Warden*, 401 U.S. 560 (1971), and culminating in *United States v. Hensley*, 469 U.S. 221 (1985), this Court has repeatedly emphasized that an officer may arrest a citizen based on a crime accusation that is contained in a police flyer or radio bulletin—even if the arresting officer knows nothing at all about the circumstances that establish probable cause—so long as "the officers who *issued* the flyer [or radio call] possessed probable cause." *Hensley*, 469 U.S. at 231. Based on these cases, it is by now also well established that the existence *vel non* of probable cause must be determined by assessing the objective facts *collectively* known to *all* officers involved in the investigation.[3] As this

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[2] The irrelevance of an arresting officer's subjective motivation in making the arrest is further reflected in this Court's many pre-*Whren* decisions rejecting "pretext"-based Fourth Amendment challenges. *See, e.g., United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) (traffic-violation arrest not rendered invalid by the fact it was "a mere pretext for a narcotics search"); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that the [defendant] was armed."); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (rejecting idea that officers' ulterior motive could negate legal justification for search).

[3] *See, e.g., United States v. Sandoval-Venegas*, 292 F.3d 1101, 1105 (9th Cir. 2002) ("probable cause may be based on the collective knowledge of officers at the scene of an arrest"); *United States v. Sawyer*, 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer can be imputed to the other officers under the collective knowledge doctrine."); *see also United States v. Fiasconaro*, 315 F.3d 28, 35-36 (1st Cir. 2002); *Savino v. City of New York*, 331 F.3d 63, 74 (2d Cir. 2003); *United States v. Menon*, 24 F.3d 550, 560-61 (3d Cir. 1994); *United States v. Wells*, 98

Court put it in *Illinois v. Andreas*, 463 U.S. 765, 771-72 n.5 (1983), "where law enforcement authorities are cooperating in an investigation . . . the knowledge of one is presumed shared by all."[4] It would be odd to permit courts to piece together probable cause on the basis of knowledge shared by multiple officers, but require that evidence be suppressed, or damages awarded, in cases in which probable cause *does* exist, merely because a single officer mistakenly elected to charge under a different statute for which probable cause is lacking.

3. These cases demonstrate that the Fourth Amendment protects against "unreasonable" seizures of the person, with reasonableness determined solely by the presence or absence of probable cause. *See, e.g., Robinson*, 414 U.S. at 235 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment."); *Whren*, 517 U.S. at 819 (endorsing "the traditional common-law rule that probable cause justifies a search and seizure"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Maryland v. Pringle*, 124 S. Ct. 795, 799 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if

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F.3d 808, 810 (4th Cir. 1996); *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999); *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003); *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003); *United States v. Cervine*, 347 F.3d 865, 871 (10th Cir. 2003); *Craig v. Singletary*, 127 F.3d 1030, 1042 (11th Cir. 1997) (en banc); *United States v. Williams*, 951 F.2d 1287, 1289-90 (D.C. Cir. 1992).

[4] In *Andreas*, this Court held it was "plain error" for the Appellate Court of Illinois to have refused to aggregate the knowledge of all the officers involved in the investigation, focusing instead on the level of "certainty" possessed by a single officer. *See* 463 U.S. at 771-72 n.5.

the arrest is supported by probable cause."). An otherwise "reasonable" arrest—*i.e.*, an arrest supported by probable cause—is not transformed into an "unreasonable" invasion of the person because of the arresting officer's motivation or flawed legal reasoning in making the arrest.

Seen another way, it is the presence of certain objective facts, and nothing more, that gives rise to the authority under the Fourth Amendment to seize the person. As the Eighth Circuit has explained, "[f]rom the standpoint of the individual, the figurative zone protecting his privacy and personal integrity may be encroached under the law only by facts and circumstances totaling probable cause for arrest." *Klingler v. United States*, 409 F.2d 299, 304 (8th Cir. 1969); *see also Locke v. United States*, 11 U.S. 339, 348 (1813) (the term "probable cause" "imports a seizure made under circumstances which warrant suspicion"). There is no additional requirement that the arresting officer have the "correct" motivation in effecting the seizure. Nor does the Fourth Amendment require that the arresting officer engage in the "correct" legal analysis or articulate the most precise legal justification for the seizure at the moment he makes the arrest. *Cf. Illinois v. Gates*, 462 U.S. 213, 235 (1983) (noting that law enforcement agents usually are "nonlawyers," and should not be held to the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings") (quotation omitted).

All that is required is that "at [the] moment [of the seizure] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck*, 379 U.S. at 91. As the Court said in *Pringle*, "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police offi-

cer, amount to probable cause." 124 S. Ct. at 800 (quotation omitted).[5]

B. This Court Should Reject The Ninth Circuit's Approach

The closely-related offense rule necessitates an examination of the officer's subjective motivation and/or the adequacy of his individual legal reasoning in making an arrest, directly contradicting this Court's many decisions holding that the arresting officer's motivation has no bearing on Fourth Amendment "reasonableness" determinations. This Court should hold that the proper test for whether an arrest violates the Fourth Amendment is whether it is supported by probable cause to believe that *any* arrestable offense has occurred.

1. The Ninth Circuit's approach cannot be squared with this Court's precedent. *Whren* holds that an officer's subjective motivation in making an arrest is irrelevant to the constitutional inquiry, yet the closely-related offense rule defines what is reasonable under the Fourth Amendment by reference to the specific offenses that motivated the officer to make the

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[5] It is by no means clear that the officers lacked probable cause to arrest Alford for a Privacy Act violation. In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the respondent was arrested for violating an ordinance that later was declared constitutionally void for vagueness in all of its applications. This Court nevertheless held that the officers had probable cause to make the arrest, explaining that the respondent's conduct violated the plain language of the ordinance, and that "[a] prudent officer, in the course of determining whether respondent had committed an offense . . . , should not have been required to anticipate that a court would later hold the ordinance unconstitutional." *Id.* at 37-38. The same reasoning should apply here. The fact that the Privacy Act may be judicially interpreted as inapplicable to Alford's case does not necessarily mean the officers lacked probable cause to arrest for a Privacy Act violation, given that the arrest was based on a reasonable common-sense reading of the statute and there was no definitive, controlling authority to the contrary. *See DeFillippo*, 443 U.S. at 37 (probable cause present where, at time of arrest, "there was no controlling precedent that this ordinance was or was not constitutional"). *See also* pp. 22-25 *infra*.

arrest. Under the Ninth Circuit's approach, an arrest is constitutional only if the officer's motivation in making the arrest matches up with the same or similar offenses for which probable cause existed. *Whren*, in contrast, asks simply whether the arrest is "*justifiable* on the basis of probable cause to believe that a violation of the law has occurred" (517 U.S. at 811, emphasis added)—*not* whether that justification is plausible (the question in *Whren*) or whether the officer happened to articulate that precise justification at the moment of arrest (the question presented here). *See United States v. Dhinsa*, 171 F.3d 721, 725 (2d Cir. 1998) ("A fair reading of *Whren* . . . leads to the conclusion that an observed traffic violation legitimates a stop even if the detectives do not rely on the traffic violation.").

Here, there is no question that probable cause existed to arrest Alford—at the very least—for criminal impersonation and obstructing a law enforcement officer. Alford's conduct strongly suggested that he was impersonating a policeman; indeed, he had left that exact impression with the stranded motorists. *See* WASH. REV. CODE § 9A.60.040(3)(a) ("A person is guilty of criminal impersonation in the second degree if the person . . . [c]laims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer"). As Judge Gould remarked, Alford's conduct "was ominous to say the least." 333 F.3d at 979. Moreover, Alford's admitted lying to Trooper Haner and his apparent feigning ignorance of how to activate his wig-wag headlights provided probable cause to arrest for obstruction. *See* WASH. REV. CODE § 9A.76.020 ("A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.").[6] In short,

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[6] Alford's conduct also appeared to violate WASH. REV. CODE § 46.16.240, which provides that license plates shall be attached to a vehicle "in such a manner that they can be plainly seen and read at all times." Haner testified that Alford "had a dark, smoked, tinted license plate cover making it unreadable." Tr. 209.

Alford's conduct established probable cause for *arrest*. That is the extent of the analysis required under *Whren*, and the Ninth Circuit should have gone no farther.

The closely-related offense rule is intended to smoke out sham arrests by looking to the offenses the officers identified at the time of the arrest. Implicit in the rule is the presumption that any *ex post* rationale—or at least any *ex post* rationale that is not "closely related" to the initial rationale—is likely to be nothing more than an attempt to cover up a sham. *See, e.g., Sheehy v. Town of Plymouth*, 191 F.3d 15, 21 (1st Cir. 1999) (allowing reliance on unrelated offenses "would open the door to the extrapolation of offenses in an effort to justify a sham arrest") (quotation omitted); *Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989) (officers should not be allowed "to justify what from the outset may have been actually sham or fraudulent arrests on the basis of *ex post facto* justifications that turn out to be valid").

But this ignores the clear mandate of *Whren*. This Court held that even if an arrest *is* a "sham"—in the sense that the officer's stated motive for the arrest was not the "real" motive—that fact is irrelevant to the Fourth Amendment inquiry. In reaching this conclusion, the Court rejected the defendants' proposed approach—comparing the officer's alleged motivation with what a reasonable officer would have done under the circumstances—as an "attempt to root out subjective vices through objective means." 517 U.S. at 814. Here too, the closely-related offense rule is nothing more than an "attempt to root out subjective vices through objective means," namely by requiring the officers to identify on the record all possible legal bases for the arrest at the time the arrest is made. As the Court explained in *Whren*, such an approach might make sense if the Court's Fourth Amendment precedents were based only "upon the evidentiary difficulty of establishing subjective intent." *Id.* But the Court's precedents are "not based only upon that or even principally upon that." *Id.* Rather, they are based on the notion that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* In this case, the circumstances allowed the officers to arrest Alford, *whatever* the officers' subjective intent.

Although the courts that have adopted some form of the closely-related offense rule suggest that the inquiry is "entirely objective," *see, e.g., Gassner*, 864 F.2d at 398, that is not the case. Any test that looks to the offenses the officer identifies as the basis for the arrest is inherently and unavoidably subjective, because it depends on the officer's subjective understanding of the law as applied to the facts and circumstances. In other words, the starting point for the closely-related offense rule is the offenses the officer concludes the law will support; it is the officer's initial subjective justification for the arrest that determines the scope of all possible offenses that could later provide a probable cause basis for the arrest. Such a test is profoundly subjective, not objective.[7]

2. If the closely-related offense rule is permitted to survive and co-exist alongside *Whren*, the perverse result will be

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[7] By contrast, the test applied by the circuits that disagree with the Ninth Circuit is objective, rather than subjective, in that it focuses on the facts known to the officer rather than on the officer's assessment of the legal significance of those facts. For example, in *United States v. Bookhardt*, 277 F.3d 558, 567 (D.C. Cir. 2002), the court held that "if a police officer arrests a defendant on a ground that ultimately proves invalid, the arrest is nonetheless lawful if the same officer had probable cause to arrest the defendant for a different criminal offense." Thus, "[a]s long as [the officer] had an objectively valid ground upon which to arrest [the defendant], the fact that he articulated an invalid ground does not render the arrest unlawful." *Id.* at 566. *See also Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994); *United States v. Kalter*, 5 F.3d 1166, 1168 (8th Cir. 1993); *Lee v. Ferraro*, 284 F.3d 1188, 1195-96 (11th Cir. 2002). As this Court held in *Maryland v. Macon*, 472 U.S. 463 (1985), "[w]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 470-71 (quotation and citation omitted).

that an officer who arrests out of malice and admits it was based on a pretext will be deemed to have acted lawfully if the pretextual arrest is nonetheless supported by probable cause—whereas a well-meaning officer could be held personally liable if he is honest about the reason for the arrest, but has made a good-faith mistake of law. Ironically, the well-meaning officer who makes a good-faith mistake would be exposed to punishment *because* he failed to manufacture a pretextual basis for the arrest. *Cf. United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) ("We fail to see . . . why the police should be in a better position if they prevaricate about the reason for arresting a defendant than if they make an honest mistake of law.").

Here, the record reflects that Officers Devenpeck and Haner were well aware of other possible bases for the arrest—indeed, the reason Alford was pulled over in the first place was for possible impersonation of an officer—but they consciously chose *not* to "stack" additional charges against Alford. Deputy Prosecutor Lindquist testified that when he was speaking with Sergeant Devenpeck on the phone the night of the arrest, he was "floating the possibility of stacking some more charges" on Alford. Tr. 373. Devenpeck testified that Lindquist advised him to charge Alford with obstructing an officer, but Devenpeck told him that "the State Patrol doesn't stack charges .... If you stop an alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation." *Id.* at 320. Had the officers arrested Alford for impersonation or obstruction in addition to the tape recording, there would have been no basis for a false arrest claim and this lawsuit would never have been brought. By treating the officers' exercise of discretion in Alford's favor as the basis for finding they violated his civil rights, the closely-related offense rule ensures that no good deed goes unpunished.

The closely-related offense rule should be rejected for the additional reason that it is unworkable in practice: it has

not been applied consistently within the lower courts, or even within the Ninth Circuit itself. The main problem lies in determining the precise scope of conduct that may be considered in determining whether two offenses are "related." For example, in this case, the Ninth Circuit held that the two offenses must "involve[ ] the *same conduct*." 333 F.3d at 976. But in *Bingham v. City of Manhattan Beach*, 341 F.3d 939 (9th Cir. 2003), the court framed the test as requiring that the two offenses involve "the same *course of conduct*." *Id.* at 951 (emphasis added). The outcome of this case thus turned on which version of the Ninth Circuit test was applied, in that impersonation and obstruction charges may not have involved the same "conduct" as the tape recording charge, but they clearly arose from the same "course of conduct."

An additional problem lies in the difficulty of articulating a rule that can specify *how* closely related two offenses must be in order to qualify as "closely related." Under the Ninth Circuit's rule, as Judge Reinhardt explained in *Bingham*, "in order for an alternate justification for the arrest to be upheld, it must be closely related—the *more* closely related the offenses, the more likely the arrest to be lawful." 341 F.3d at 955 (Reinhardt, J., dissenting). Such a vague rule provides law enforcement officers with no meaningful guidance as to when an arrest may cross the line from constitutional to unconstitutional, and the decisions of other circuits that have adopted some form of the rule are similarly opaque. *See, e.g., Avery v. King*, 110 F.3d 12, 14 (6th Cir. 1997) (construing "closely related" standard as requiring that offenses be "in some fashion related") (quotation omitted); *Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982) (observing that the definition of "related" has been "left for case law development").

Another area of confusion is whether the offenses that provided the basis for the arrest should be determined by what the officer announces at the scene, or by the offenses cited when the suspect is brought to the police station for booking. *Compare Sheehy v. Town of Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999) ("related crimes analysis should focus

on the conduct underlying the crime cited by the officer at the time of the arrest") with *Richardson v. Bonds*, 860 F.2d 1427, 1430 (7th Cir. 1988) ("[i]f statements made by the officer at the time of the arrest were used as an indication of the offense for which the officer believed probable cause existed, officers could simply remain silent as to the basis for the arrest") and *Klingler v. United States*, 409 F.2d 299, 306 (8th Cir. 1969) ("The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law, following the heat of a chase, to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.") (quotation omitted).

This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet virtually any formulation of a closely-related offense rule will cause uncertainty in the field, and result in far more occasions for constitutional review, as courts and juries struggle to determine what the exact "conduct" was in a particular case, what the precise offenses were that formed the basis for an arrest (and when they were articulated), and whether those offenses are "closely related" or merely "related." As this Court explained in *Atwater*, "the object in implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Id.*

Finally, the closely-related offense rule should be rejected because it makes no sense from a policy perspective and will have harmful consequences not just for officers, but for criminal defendants as well. The rule creates an incentive for police officers to stack charges against suspects as a way of insulating the arrest from Fourth Amendment challenge—and of protecting themselves against personal liability—in

the event a particular charge does not "stick." As the D.C. Circuit recognized in *Bookhardt*, the closely-related offense rule does "no more than create an incentive for the police 'to routinely charge every citizen taken into custody with every offense' they can think of, 'in order to increase the chances that at least one charge would survive'—yielding no additional protection of civil liberties while adding considerably to the burden placed upon both defendants and police." 277 F.3d at 566 (quoting *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971)). "Such a clogging of the criminal process already heavily encumbered, would be pointless." *Atkinson*, 450 F.2d at 838.

By incentivizing officers to charge every possible offense supported by probable cause, the closely-related offense rule undermines the discretion law enforcement officers have traditionally exercised. The United States Attorneys' Manual states that "[i]t is important to the fair and efficient administration of justice in the Federal system that the government bring as few charges as are necessary to ensure that justice is done" and that "[t]he bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive . . . exercise of power." Manual at § 9-27.320(B). Under the guise of protecting the rights of criminal suspects, the Ninth Circuit's approach actually limits officers' ability to exercise their discretion *in the suspects' favor* by not charging every possible offense.

II. THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY MUST BE REVERSED

This Court has recognized that qualified immunity leaves "ample room for mistaken" but nonetheless reasonable "judgments" by police officers concerning legal requirements. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). Even where an officer's conduct violates the Constitution, the officer is immune from personal liability unless "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional.

Id. at 341. "[I]f officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Id.* Accordingly, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Anderson*, 483 U.S. at 641).

Because the Ninth Circuit erred in finding a constitutional violation, the court's denial of qualified immunity must be reversed on that basis alone. But the court's decision is erroneous for several additional reasons, primarily because the law in question was not "clearly established" and because the officers' conduct was objectively reasonable in any event.

A. The Officers Did Not Violate "Clearly Established" Law

The Ninth Circuit erred in deeming it "clearly established" that Alford's tape recording was lawful under Washington's Privacy Act. *See* 333 F.3d at 977. This Court has explained that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). *See also Anderson*, 483 U.S. at 640 ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.").

In this case, the relevant inquiry is whether a reasonable officer could have believed that arresting Alford for violating Washington's Privacy Act was lawful, in light of clearly established law and the information the officers possessed. The

answer to that question is plainly yes. The statute, which applies to "private" conversations, can reasonably be construed to encompass a conversation occurring at night time on a desolate stretch of road, with no third parties present and no passers-by in the vicinity. *See* WASH. REV. CODE § 9.73.030(1)(b) ("it shall be unlawful for any individual . . . to intercept or record any . . . [p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all persons engaged in the conversation"). To be sure, the fact that one of the parties to the conversation is a police officer acting in the course of his official duties may have a bearing on whether the conversation can properly be deemed "private" as a matter of law. But the text of the statute offers no guidance on this point. Although there is a provision exempting reporters, *see* WASH. REV. CODE § 9.73.030(4), there is no similar exception for police officers.

In any event, the Ninth Circuit's basis for deeming the law "clearly established" was not the text of the statute itself, but a 1992 decision from an intermediate Washington appellate court construing and narrowing the statute, *State v. Flora*, 845 P.2d 1355 (Wash. App. Div. 1 1992). *Flora* held that, at least in certain circumstances, the Privacy Act was not violated when an individual tape recorded his conversation with police officers.

Even taking *Flora* for all it might be worth—*i.e.*, as a rule of law exempting the taping of police officers from the reach of the Privacy Act—a single case from an intermediate state appellate court is not sufficient to "clearly establish" the legal rule in question. That is particularly true here, where the court in question was not the appellate court for the area where the arrest occurred.[8] In *Wilson v. Layne*, this Court

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[8] Washington State is divided into three appellate divisions, and a decision from one appellate division is not binding on the others. *See, e.g.*, *Joyce v. State Dep't of Corrections*, 75 P.3d 548, 559 n.9 (Wash. App. Div. 2 2003) (case from another division "is merely persuasive authority and is not binding on us"), *review granted*, 84 P.3d 1229 (Wash. 2004).

held that a rule was not "clearly established" when "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. 603, 617 (1999). So too here: the decision in *Flora* was not binding on the appellate court for the area of Washington state where the arrest was made. Aside from *Flora*, the Ninth Circuit identified no other case reaching the same result, let alone a "consensus of cases."

Moreover, *Flora* is clearly distinguishable on its facts, in that the court's conclusion that the taped conversation was not "private" apparently depended, at least in part, on the presence of a third party and passers-by. Indeed, the court stated that it was rejecting the view "that public officers performing an official function on a public thoroughfare *in the presence of a third party and within the sight and hearing of passersby* enjoy a privacy interest which they may assert under the statute." 845 P.2d at 1357 (emphasis added). The court then commented that "[d]etermining whether a given matter is private requires a fact-specific inquiry," thus undercutting any suggestion that it was creating a *per se* rule applicable to police officers conducting official business. *Id.*

The Supreme Court of Washington does not appear ever to have embraced a rule of law that a citizen *always* has a right to tape record his interactions with police. In its only discussion of *Flora*, the court emphasized that it was the public nature of the arrest, and the presence of a third party, that rendered the Privacy Act inapplicable in that case. *See State v. Clark*, 916 P.2d 384, 392-93 (Wash. 1996) (describing *Flora* as standing for the proposition that "a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private").[9] The court explained that "[t]he officers in *Flora* had no personal privacy interest in statements made as public officers effectuating an arrest in public" because "the presence of another person during the conversation means that the matter is not secret or confidential." *Id.* at 393.

In short, even if the law required officers to parse through all conceivably applicable precedents before making an arrest—and to do so with the discrimination of an Oxford don—it would be impossible to say that petitioners' conduct violated any "clearly established" principle of Washington law.

B. The Officers' Conduct Was Objectively Reasonable

The jury concluded that the officers' conduct was objectively reasonable and ruled in their favor. The Ninth Circuit's conclusion to the contrary cannot be sustained.

The undisputed evidence established that Sergeant Devenpeck reviewed the text of the Privacy Act while at the scene. Tr. 312. He then called a trooper in order to obtain the phone number of the deputy prosecutor, whom he had to telephone twice before finally reaching him at home. *Id.* at 314. Devenpeck read the text of the Act to the prosecutor over the phone, and the prosecutor seconded Devenpeck's judgment that the arrest of Alford was supported by probable cause. *Id.* at 316. As Judge Gould recognized, the officers "reasonably believed Alford's tape recording of the traffic stop was outlawed by the Washington Privacy Act," and their conduct "provided an example of how a responsible and fair-minded officer should proceed deliberately when unfamiliar with the law a person is or may be violating." 333 F.3d at 980.

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[9] *Clark* involved the reverse situation of that presented here: in *Clark*, the *officers* had taped the *suspects'* interactions with a police informant, and the suspects sought to suppress the recordings under the Privacy Act.

"Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law," *Butz v. Economou*, 438 U.S. 478, 507 (1978), and the fact that the prosecutor agreed that Alford violated the Privacy Act is an objective benchmark indicating that the officers' mistake of law was a reasonable one. That the officers were unaware of the *Flora* decision cannot render their conduct objectively unreasonable. The officers looked to the best source of authority available—the statute itself—and confirmed their probable cause assessment with an attorney presumably an expert in criminal law—the prosecutor. They trusted the prosecutor's judgment. This Court has long "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Because "[u]nder settled law, [Devenpeck and Haner] are entitled to immunity if a reasonable officer could have believed probable cause existed to arrest [Alford]," *Hunter*, 502 U.S. at 228, the Ninth Circuit's denial of immunity must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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